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No. _____

In The

Supreme Court of the United States

JAMES CLARENCE McDOUGAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Pro Se

JAMES CLARENCE McDOUGAL
ID# 74044-080
FPC-Uvalde Unit
P.O. Box 4300
Three Rivers, Texas 78071

FILED

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in denying Petitioner's request for issuance of a certificate of appealability in support of his motion to vacate pursuant to 28 U.S.C. § 2255 on the constitutionality of his sentence, in light of Apprendi v. New Jersey and its **PROGENY**.

2. Whether the district court exceeded its jurisdiction in sentencing Petitioner under a defective indictment, for a crime for which he was not charged nor convicted, thus, depriving him of the constitutional right to answer only for those crimes presented to the grand jury and seriously affecting the fairness, integrity, or public reputation; therefore, there is no procedural default on questions of jurisdiction.

LIST OF PARTIES TO THE PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.1

Pursuant to Supreme Court Rule 14.1(b), Petitioner, James Clarence McDougal, certifies that the names of all parties to this proceeding appear in the caption of this Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 29.1, Respondent, United States of America, was represented before the trial court by the United States Attorneys Office for the Western District of Texas, Waco Division.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, James Clarence McDougal, respectfully petitions this Court for a writ of certiorari to review the order of the Court of Appeals for the Fifth Circuit, denying petitioner his application for issuance of a certificate of appealability contrary to this Court's decision in *Apprendi v. New Jersey*, and its progeny.

REPORTED DECISIONS

The following decisions and opinions in this case directly relating to the questions presented have been reported and are included in the citations.

1. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) (announced a sweeping rule as a matter of constitutional law: "[o]ther than the fact of a prior conviction, **any fact** that increases the penalty for a crime beyond the prescribed statutory maximum must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.

2. *Jones v. United States*, 526 U.S. 227, 252-53 (1999), "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, **any fact** (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id. at 1224 n.6. The constitutional principle underlying *Jones* requires this Court to hold that drug quantity is an element of the offenses described in § 841.

3. *In re Winship*, 397 U.S. 358, 364 (1970), the Due Process Clauses of the Fifth and Fourteenth Amendments

require the Government to prove the essential elements of a crime beyond a reasonable doubt.

4. In *Ex parte Bain*, 121 U.S. 1, 30 L.Ed. 849, 7 S.Ct. 781 (1887), this Court first stated its "opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged." 121 U.S. at 12-13.

5. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), the benchmark case involving the sufficiency of an indictment, this Court noted that, the first criterion for measuring the adequacy of an indictment is "whether the indictment contains the elements of the offense intended to be charged."

6. *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999), the Fifth Circuit held that a statutory citation standing alone cannot substitute for including an element of the crime in the indictment.

7. *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), this Court stated that, as a general rule, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." If the rule is one of criminal procedure, rather than substance, then the test set forth in *Teague* is applicable. Under that test, the rule, if a "**watershed**" rule of criminal procedure (second exception) is to be applied retroactively.

8. *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998), the court reversed and remanded the case for resentencing, finding that the district court did not have jurisdiction to impose an enhancement sentence on defendant; and that the showing of cause and prejudice was not required as jurisdictional claims could not be waived by **procedural default**.

The district court decision is not reported. A copy of the order is attached. The Court of Appeals for the Fifth Circuit's opinion is not reported. A copy of the opinion is attached.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 11, 2001, denying petitioner's request for issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2), and Fed.R.App.P. 22(b). The opinion of the Fifth Circuit is unreported, and a copy is attached as Apprendi A to this petition (A.1). The order of the United States District Court for the Western District of Texas is not reported. A copy is attached as Apprendi B to this petition (A.11).

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeals' decision by writ of certiorari. The Court of Appeals has jurisdiction under 18 U.S.C. § 3742(a), and 28 U.S.C. § 1291. The district court has jurisdiction over this case under 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part as follows:

> "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. V.

This case also implicates 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), which provides in pertinent part:

> [I]t shall be unlawful for any person to **knowingly or intentionally** . . . possess with intent to . . . distribute . . . a controlled substance.

21 U.S.C. § 841(a)(1) (emphasis added).

> In the case of a controlled substance in Schedule I or Schedule II . . . 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years, and if death or serious bodily injury results from the use of such substance shall be not less than 20 years. . . .

21 U.S.C. § 841(b)(1)(B)(viii).

STATEMENT OF THE CASE

On November 12, 1996, **James Clarence McDougal**, was charged in counts one and seven of a Second Superseding Indictment with conspiracy to distribute and to possess with intent to distribute Methamphetamine and possession with intent to distribute Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), and 846. Count seven charged McDougal with unlawfully, knowingly, and intentionally possess with intent to distribute Methamphetamine, a Schedule II Controlled Substance, in violation of 21 U.S.C. § 841(a)(1). Pursuant to a plea

agreement and before the Honorable Walter S. Smith, United States District Judge for the Western District of Texas, Waco Division, Mr. McDougal entered a plea of guilty on February 27, 1997.

The case underlying this petition is an action that involves a violation of the Due Process Clause, Amendment V; and the Grand Jury Clause of the United States Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is jurisdictional and no court of the United States has authority to try a prisoner without indictment or presentment in such cases. *United States v. Krepper,* 159 F.2d 958, 970 (3d Cir. 1946) (quoting U.S. Const. amend. V).

The district court disposed of all of McDougal's claims for relief and granted the full relief requested by the United States Government on denying petitioner's claims that drug quantity was an element of the offense, that should have been charged in the indictment, submitted to the Grand Jury, and proved beyond a reasonable doubt; failure to charge an offense in the indictment was jurisdictional error, depriving the district court of jurisdiction to sentence McDouglas as it did. The failure to include drug quantity in the indictment by charging a defendant with violating 21 U.S.C. §§ 841(a)(1) and 846 renders an indictment constitutionally defective, not amenable to harmless error review.

McDougal petitioned the Court of Appeals for the Fifth Circuit to review the district court's ruling by requesting an application and issuance of a certificate of appealability in support of his § 2255 motion to vacate.

Without oral argument the Court of Appeals denied the application for issuance of a (COA).

No more important, nor contentious an issue arises in American Law Jurisprudence, than the appropriate role of the Supreme Court must rely on is the law; and if the law has changed a substantial constitutional right, such as the Fifth or Sixth Amendment, then it must be affected by Supreme Court decision and made retroactive to avoid prisoners languishing in prison when their rights have been violated.

Petitioner now seeks relief of the Fifth Circuit's Order denying his application for issuance of a certificate of appealability in support of his motion to vacate pursuant to 28 U.S.C. § 2255.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in failing to consider Petitioner's argument that drug quantity should have been alleged in the indictment, submitted to the grand jury, and proved beyond a reasonable doubt. The Fifth Circuit held in this case, that McDougal has not made a substantial showing of the denial of a constitutional right. This ruling in no way hinged upon the Fifth Circuit's special expertise in substantive criminal law.

Rather, the Fifth Circuit's decision rests entirely upon its outright rejection of this Court's decisions interpreting the Fifth Amendment, the Due Process Clause, and its recent landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). To endorse the claim of a failure to make

a substantial showing of the denial of a constitutional right in this case, the Fifth Circuit cast aside this Court's basic test for the determination of Fifth Amendment right, rejected this Court's precedents holding that drug quantity was an element of the offense proscribed by § 841, and not simply a sentencing factor. The Fifth Circuit also rejected this Court's precedents that the fairest reading of the statute was that the factors were required to be alleged in the indictment, and proved beyond a reasonable doubt. In addition to this interpretation, this Court relied on the need to avoid possible violation of a constitutional principle. It held that, "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increase the maximum penalty for a crime must be charged in the indictment." *Id.* at 1224 n.6.

Justice O'Connor remarked in dissent, described the *Apprendi* decision as "**watershed change in constitutional law.**" *Apprendi v. New Jersey*, 120 S.Ct. at 2380 (O'Connor, J., dissenting). It is worthy of note that Justice O'Connor authored the opinion in *Teague*, which provided that with respect to procedural rules, a "watershed" rule is to be applied retroactively.

In addition, in the case at bar, the Government's indictment is "fatally defective for failing to allege and/or plead to specific statutory language in each of the charges filed against the defendant." Rule 7(c)(1) Fed.R.Crim.P. requires that the indictment be plain, concise and a definite written statement of the essential facts constituting the offense charged. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

The Fifth Circuit refused to follow this Court's decision in *Russell* as well as its prior precedents in *United States v. Fitzgerald*, 89 F.3d 218, 221 (5th Cir. 1996); *United States v. Richards*, which states that, an indictment's failure to charge the offense "is a jurisdictional defect" that may be raised "at any time," including "for the first time on appeal." Federal Rule of Criminal Procedure 12 states that: an objection that the indictment "fails to show jurisdiction by the court or to charge an offense" must be noticed by the court at any time during the pendency of the proceedings. Fed.R.Crim.P. 12(b)(2). This case creates the type of conflict with this Court, and other circuits that warrants Supreme Court review.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION PRESENTED IS ONE OF EXTRAORDINARY NATIONAL IMPORTANCE THAT THE FIFTH CIRCUIT AND THE LOWER COURT WILL NOT FURTHER ANALYZE UNLESS GIVEN DIRECTION BY THE HIGH COURT.

This case presents a fundamental question of the interpretation of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). The question presented is one of national importance because it affects defendant's Fifth and Sixth Amendments to the U.S. Constitution. In view of the large amount of litigation over the landmark decision by this Court, guidance on the question is also of great importance to the judiciary. In

addition, the question presented is also of great importance to prisoners, because it affects their ability to receive fair decisions in court proceedings that may result in months or years of added incarceration.

This issue's importance is enhanced by the fact that the Fifth Circuit and lower court in this case, have seriously misinterpreted *Apprendi*. This Court held that before *Apprendi*, Judges could raise a sentence with certain "sentencing-enhancing" facts that had not been proven to a jury. After *Apprendi*, with the exception of the use of previous criminal convictions:

> **"[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear, that such facts must be established by proof beyond a reasonable doubt."**

Apprendi at 2363 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999)).

This case therefore, presents "a matter of special importance to the entire Nation." *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 113 S.Ct. 1967, 1977 (1993). Now more than ever this Court should take the opportunity to address the right to McDougal's constitutional claim, which is premised on the due process and jury trial guarantees found in the Fifth Amendment to the U.S. Constitution to invalidate his conviction and sentence.

Unless corrected by this Court, the Fifth Circuit's ruling will impose a significant burden on defendants like McDougal to be sentenced on the element of drug

quantity without submitting the quantity in the indictment, charged to the grand jury, and proved beyond a reasonable doubt. This burden will extend well beyond drug cases. Departing from all precedent, the Fifth Circuit ignored this Court's ruling that drug quantity was an element of the offense proscribed by § 841, and not simply a sentencing factor. *Jones v. United States*, 119 S.Ct. 1215 (1999).

The lower court's reasoning that *Apprendi* was not applicable to the case at bar, because it was not retroactive is unconvincing. Its ruling is misplaced. It has relied on cases that are second or successive petitions under § 2255, and has failed to address McDougal's argument that the district court lacked jurisdiction to sentence him as it did. Failure to charge an offense in the indictment is a jurisdictional error. *Richards*, 204 F.3d 177 (5th Cir. 2000); *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999). Therefore, there is no reason for this Court to refrain from definitely resolving the question presented now.

II.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH MANY DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. The Fifth Circuit Has Rejected Outright This Court's Basic Test For Determining The Scope Of Fifth Amendment Rights.

The Grand Jury Clause of the United States Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const.

amend. V. The Court said that: "to comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him; and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense." *United States v. Santeramo*, 45 F.3d 622, 624 (2d Cir. 1995) (per curiam).

Plain error review is appropriate where the defect in the indictment is jurisdictional. Where an indictment fails to allege each material element of the offense, it fails to charge that offense. See *United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999), states that a statutory citation standing alone cannot substitute for including an element of the crime in the indictment. A "failure of the indictment to charge an offense may be treated as a jurisdictional defect, . . . and an appellate court must notice such a flaw even if the issue was raised neither in the district court nor on appeal." *United States v. Foley*, 73 F.3d 484, 488 (2d Cir. 1996) (quoting *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir. 1965)), abrogated on other grounds by *Salinas v. United States*, 522 U.S. 52, 139 L.Ed.2d 352, 118 S.Ct. 469 (1997); see also Fed.R.Crim.P. 12(b)(2) (objection that an indictment "fails to show jurisdiction in the court or to charge on offense . . . shall be noticed by the court at any time during the pendency of the proceedings") (emphasis added).

The notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal court is long established. In *Ex parte Bain*, 121 U.S. 1, 30 L.Ed. 849, 7 S.Ct. 781 (1887), this Court first stated its "opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the

crime with which he was charged." 121 U.S. at 12-13. For this proposition, "the *Bain* case . . . has never been disapproved. . . . " *Stirone v. United States*, 361 U.S. 212, 218, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960).

Consequently, it has long been a settled rule of law in the United States Courts that the Declaration of Article 5 of the Amendments to the Constitution that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is jurisdictional and no court of the United States has authority to try a prisoner without indictment or presentment in such cases. *United States v. Krepper*, 159 F.2d 958, 970 (3d Cir. 1946) (quoting U.S. Const. amend. V).

This Court has repeatedly instructed the lower courts that, the first criterion for measuring the adequacy of an indictment is "whether the indictment contains the elements of the offense intended to be charged." *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). If an element of the offense (drug quantity or 841(b)) is not charged in the indictment, it would be difficult for the grand jury/jury to make a finding by special verdict, under the principles of *Apprendi*, without knowing what those elements are as it relates to the evidence presented in the Government's case-in-chief.

Consistent with this Court's prior rulings, the Fifth Circuit disregarded the nature of the relief sought by petitioner, even though this Court has repeatedly emphasized that, Rule 7(c) of the Federal Rules of Criminal Procedure, in 1946. The rule provides in pertinent part: "the indictment, be a plain, concise and definitive written

statement of the essential facts constituting the offense charged." *Russell*, 8 L.Ed.2d at 250, 261.

The Due Process Clause of the Fifth and Fourteenth Amendments require the Government to prove the essential elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). In this case, the statutes §§ 841(a)(1) and 846 appear in the indictment, e.g., § 841(b)(1) does not appear at all, similarly, the enforcement of the indictment is at issue here. The enacted statute is not incorporated in the indictment, therefore, there can be no jurisdiction to act against McDougal. This Court should grant certiorari to review the Fifth Circuit's outright refusal to follow this Court's basic Fifth Amendment test.

B. The Element of Drug Quantity Should Have Been Included In The Indictment, And Charged To The Grand Jury/Jury.

McDougal was charged with conspiracy to distribute and to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). The indictment failed to include the quantity of methamphetamine that McDougal allegedly possessed. The Government did not file a separate notice advising petitioner that it intended to seek an enhancement of his sentence, if convicted, based on quantity. At sentencing, McDougal failed to object that drug quantity was an element of the offense proscribed by § 841, and not simply a sentencing factor. As drug quantity had not been alleged in the indictment, McDougal contends, his sentence could not be statutorily enhanced. (Citing *Jones v. United States*, 119 S.Ct. 1215 (1999)).

Because drug quantity was not alleged in the indictment, the district court did not have jurisdiction to impose an enhancement sentence on petitioner; and the showing of cause and prejudice was not required as jurisdictional claims could not be waived by procedural default. *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). By these omissions, the Government has failed to implicate the sentence to be imposed, and has failed to apply the statute consistent with its intent as legislated by Congress.

Moreover, Section 841(a)(1) does not establish a penalty or a quantity of drugs. In this case, the omission of § 841(b)(1) in the indictment, the Government has failed to establish both the crime and the penalty for which the petitioner is exposed when indicted.

III.

THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S APPRENDI RULING AND AMERICAN LAW JURISPRUDENCE

A. This Court's Precedents Establish That Apprendi v. New Jersey Was Decided Upon Constitutional Grounds, And Petitioner's Ground For Relief Is, Likewise Of Constitutional Magnitude.

Apprendi v. New Jersey should be applied retroactively to the case at bar. Since, by virtue of this Court's decisions in *Teague v. Lane*, and *Bousley v. United States*, 523 U.S. 614 (1998); *Apprendi* is retroactive to cases on collateral review. Indeed, even before this Court's ruling in *Apprendi*, this Court, per Justice O'Connor, explained in

Teague, the rule if a "watershed" rule of criminal procedure (second exception) is to be applied retroactively.

The lower court and Fifth Circuit rejected these Supreme Court's precedents as well. Accordingly, the district court stated these cases do not stand for the proposition that this Court has made *Apprendi* retroactive. The Fifth Circuit's reading of this Court's cases is unsupportable. This Court has held, in *Apprendi* that, "at stake in this case are constitutional protections of surpassing importance." *Apprendi*, 120 S.Ct. at 2355.

Thus, regardless whether *Apprendi* is a rule of procedure or a rule of substantive criminal law, this Court indicated that it did not create new law, but merely ratified a long-established principle of law. If the rule is substantive, then it applies **retroactively** to cases on collateral review. *Bousley v. United States*, 523 U.S. 614 (1998).

If the rule is one of criminal procedure, rather than substance, then the test set forth in *Teague* is applicable. Under that test, the rule, if a "**watershed**" rule of criminal procedure (second exception) is to be applied retroactively.

B. The Fifth Circuit Has Shown A Continued Disregard For This Court's Ruling In Apprendi, And Its Prior Holdings In Its Own Circuit.

The Fifth Circuit is not obligated solely to consider its prior holdings in *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000), *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999), and *United States v. Longoria*, 259 U.S. 363 (5th Cir. 2001); it is required to following those rulings. Thus, unlike the Fifth Circuit, McDougal now requests

that this Court grant certiorari to make clear, that *Apprendi* is applicable to the case at bar. As a matter of jurisdictional law, the district court lacked jurisdiction to sentence the petitioner as it did, thereby denied his Fifth Amendment to Due Process of Law under the U.S. Constitution.

CONCLUSION

This Court has pronounced a rule of pressing national importance. Its ruling requiring that, **any fact** (other than prior conviction) that increase the maximum penalty for a crime must be charged in the indictment. In a case such as this, drug quantity was not alleged in the indictment, the Fifth Circuit's ruling directly conflicts with this Court's precedents. For each of the reasons set forth above, this Court should grant a writ of certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50525
USDC Nos. W-01-CV-95 &
W-96-CR-60-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES CLARENCE MCDOUGAL,

Defendant-Appellant.

Appeal from the United States District
Court for the Western District
of Texas

(Filed Sep. 11, 2001)

ORDER:

James Clarence McDougal, federal prisoner # 74044-080, requests a certificate of appealability ("COA") to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion.

McDougal argues that the district court erred in dismissing his motion as untimely; he additionally argues that his sentence, which was enhanced based on drug quantities not alleged in his indictment, is illegal in light

of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). McDougal contends that his sentence was also wrongfully enhanced under U.S.S.G. § 2D1.1. If his brief is liberally construed, he further contends for the first time that counsel was ineffective in failing to raise these arguments in a direct appeal, but this claim will not be considered. *See Whitehead v. Johnson*, 157 F.3d 384, 387-88 (5th Cir. 1998).

McDougal has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES CIRCUIT
JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES CLARENCE McDOUGAL, Movant,	§	CIVIL NO. W-01-CA-095
v.	§	CRIMINAL NO. W-96-CR-060(3)
UNITED STATES OF AMERICA, Respondent.	§	

CERTIFICATE OF APPEALABILITY

(Filed Jun. 6, 2001)

On this date the Court considers Movant's Notice of Appeal and Request for Certificate of Appealability. On May 18, 2001, the Court denied Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. Pursuant to Fed. R. App. P. 22(b), the filing of Movant's notice of appeal requires the Court to either issue a certificate of appealability or state why a certificate of appealability should not issue. The Court, after considering the record in the case and the requirements of 28 U.S.C. § 2253 and F.R.A.P. 22(b), hereby finds that a certificate of appealability should not issue. Based upon the Court's Order, entered May 18, 2001, denying the § 2255 Motion as time-barred and which is incorporated by reference as if fully set forth herein, the Court finds Movant has failed to make a substantial showing of the denial of a constitutional right. Accordingly, it is

ORDERED that Movant's Application for Certificate of Appealability be and is hereby **DENIED.**

SIGNED this 6 day of June 2001.

/s/ Walter S. Smith
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE